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Supreme Court of the United States

OCTOBER TERM, 1968

No. 740

STANDARD FRUIT AND STEAMSHIP COMPANY,
Appellant

versus

UNITED FRUIT COMPANY
and
UNITED STATES OF AMERICA,
Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

JURISDICTIONAL STATEMENT

Eberhard P. Deutsch,
1800 Hibernia Bank Building,
New Orleans 70112,
Attorney for Appellant

Robert M. Moore,
René H. Himel, Jr.,
Overton T. Harrington, Jr.,
Deutsch, Kerrigan & Stiles,
Of Counsel

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No.

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versus

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Appellees

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the District Court, which has not been reported, is embodied in his order at issue, a copy of which is appended hereto at page 15 below.

Jurisdiction

A civil Government antitrust action, brought under the Sherman Act (15 USC §§1 and 2) and the Wilson Tariff Act (15 USC §8), in which appellant's dominant competitor is the defendant and to which appellant is not a party, resulted in a consent decree of divestiture. The defendant is required to file periodic programs and progress reports showing the steps it is taking to establish a new company as provided by the decree. The District Court signed a

protective order under Rule 30b, Federal Rules of Civil Procedure, sealing from public inspection all documents filed by the parties. Appellant filed a motion for leave to inspect and copy the programs and progress reports filed by the defendant.

This appeal is taken from the order denying appellant's motion. The order is dated August 14, 1968 and was entered on August 21, 1968. The notice of appeal was filed on August 30, 1968 in the United States District Court for the Eastern District of Louisiana.

The Expediting Act (15 USC §29) provides for direct appeal to this Court from final judgments in civil Government antitrust actions. Since the order appealed from settles the entire controversy between appellant and the other parties, it is a final judgment for the purpose of appeal. *Clark vs Williard,* 292 US 112, 118 (1934); and see *Cohen vs Beneficial Loan Corp.*, 337 US 541, 546 (1949); *Swift & Co. vs Compania Caribe,* 339 US 684, 688-89 (1950); *Missouri-Kansas Pipe Line Co. vs United States,* 312 US 502 (1941).

This Court has held that the appeal is to the Court of Appeals in such a case when "the controversy which is disposed of by the District Court's order is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned." *Shenandoah Valley Broadcasting, Inc. vs ASCAP,* 375 US 39, 40 (1963).

The *Shenandoah* rule has been held applicable to a motion, to rescind a protective order sealing part of the record in a Government antitrust suit which had been terminated by consent decree, ancillary to an attempt to obtain the same documents by subpoena in a subsequent private suit. *Olympic Refining Co. vs Carter,* 332 F2d 260 (CA 9-1964), cert. den., 379 US 900.

It is submitted that the *Shenandoah* and *Olympic* cases are distinguishable from this one, in which the antitrust action was not terminated by the consent decree but is still continuing as the defendant proceeds with compliance, and so far from appellant's motion being "entirely between private parties", or lying "outside the mainstream of the litigation in which the Government is directly concerned", the Government actively supported, briefed and argued the motion, and expressed strong interest in having it granted to afford the Government the benefit of appellant's views as to the defendant's compliance plans and activities. This case is nearer to *Cascade Natural Gas Corporation vs El Paso Natural Gas Co.,* 386 US 129 (1967), and *Missouri-Kansas Pipe Line Co. vs United States,* 312 US 502 (1941) (appeals from denial of post-decree intervention), and *Terminal RR Ass'n vs United States,* 266 US 17 (1924) (appeal from judgment of contempt for violation of decree).

Question Presented

Whether, in a civil antitrust action brought by the United States against the dominant company in its

industry and terminated by a consent decree (*inter alia*) of divestiture, the detailed programs and progress reports filed with the Court by the defendant, showing the steps it is taking to organize and establish a new company from its own assets pursuant to the decree, should be sealed from public disclosure, and from access by the defendant's smaller competitors whom the decree was presumably intended to protect and benefit.

Statement of the Case

In 1954 the United States commenced this civil antitrust action against appellee United Fruit Company. As appears from paragraphs 3-49 of the amended complaint and the portions thereof admitted in the answer, United dominates the banana industry in this country, a position it achieved by a series of acquisitions beginning in 1899.

In 1958, a consent decree was entered prior to trial. United was enjoined from a long list of antitrust violations (articles IV-VI), and, in addition to divestiture of a Central American railroad (article VII), was ordered to create, from its own assets, a new banana company having a specified banana-importation capacity (article VIII). The decree called for filing by United, in 1966 (later extended to 1967), of a plan for compliance with its obligation to create the new company (article VIII-E).

Shortly after entry of the decree, the District Court granted United's motion for a protective order under Rule 30b, Federal Rules of Civil Procedure,

prohibiting inspection by outsiders of documents produced pursuant to discovery, of answers to interrogatories, or of "any document submitted by either party in this case".

The plan for compliance, approved by the District Court on July 28, 1967, required United to submit to the Court (a) within one year thereafter, a detailed program for the initial organization, staffing, production, shipping, marketing and other arrangements for the new company; (b) within another year, a detailed program showing the shipping and terminal arrangements and other assets transferred to the new company by United to enable it to have the specified banana-importation capacity; and (c) within 90 days after approval of the plan, and every 60 days thereafter, a detailed report of its progress toward compliance with the plan, the programs and the decree.

Appellant, as a smaller competitor of United, has a vital interest in seeing the programs and progress reports filed by United pursuant to the plan of compliance. At appellant's request, the Government wrote to the Clerk of Court in April 1968, asking him to permit interested persons to inspect and copy these programs and reports as public records (Exhibit A to appellant's motion for leave to inspect the programs and reports). Appellant then applied to the Clerk for access to these documents; but after consulting with United's counsel, the Clerk advised appellant that the programs and reports are, in his

opinion, sealed by the protective order entered in 1958 (Exhibits B and C to appellant's motion).

Appellant then filed a verified motion in the anti-trust action for leave to inspect and copy the programs and reports. The motion set forth appellant's interest therein as a smaller competitor of United, and pointed out that although the decree appears to contemplate that United would create the new company from its own organization, the new company had already hired away the Manager of appellant's Steamship Department. At the hearing of its motion, appellant filed in evidence a letter indicating that contrary to the decree's provision that United provide, from its own assets, terminal facilities for the new company in this country, efforts are afoot to have such facilities carved out of those of appellant (Exhibit D).

Neither the Government nor United challenged appellant's standing to file this motion. At the hearing thereof, the United States filed a brief and presented oral argument in support of the motion, on the grounds that "reports and detailed plans filed with the Court in divestiture proceedings should be open for public inspection in order to give the Court and the Government the benefit of the informed judgment of all those concerned with the affected industry as to the adequacy of the steps being taken by United and in order to advise potential purchasers and investors of the nature and prospects of the new company"; that "the experience of the Department

of Justice in handling many divestiture cases indicates the desirability of such informed outside judgments on such issues as the suitability of properties and assets being transferred to the divested company"; that "these outsiders cannot be well informed if the basic data is kept secret"; that "there is a traditional common law policy in favor of open court proceedings in order to reassure the public as to the effectiveness of judicial administration"; and that "United, by far the largest competitor Sovereign (the new company) must face, already knows all this allegedly confidential information in far greater detail than a competitor could possibly learn by reading the reports".

In opposition to the motion, United filed affidavits to the effect that the new company "has not been guilty of raiding Standard's organization", but that its employment of appellant's Steamship Manager had been arranged through the suggestion and go-between offices of an anonymous mutual friend of his and of the new company's president. The affidavits also stated that appellant, if allowed to see the programs and reports, would be enabled to take various steps to prepare itself to meet the new company's competition more effectively.

At the conclusion of argument, the District Court denied the motion. Its formal opinion-order holds that the 1958 protective order extends to the programs and reports at issue, and that United's smaller competitors should be denied access thereto in order to protect the new company from any adverse effects

of knowledge thereof by its (the new company's) competitors, especially since the Court is powerless to compel comparable disclosure by the smaller competitors of their affairs to the new company. In its oral remarks, the Court commented that while it might seem anomalous that United, the dominant company, should have knowledge of the programs and reports to the exclusion of its smaller competitors, this situation is not of United's making.

The Question is Substantial

The question of closing court records and proceedings from public scrutiny is of such public importance, even in private litigation, that this Court has already exercised its power to direct mandamus to a District Court to reverse such an order in such a case. *Ex parte Uppercu*, 239 US 435 (1915).[1]

[1] And see *Bell vs Commonwealth Title Ins. Co.*, 189 US 131 (1903); *Miller vs Moise*, 168 Fed. 940 (CC Pa.-1909); *Sloan Filter Co. vs El Paso Reduction Co.*, 117 Fed. 504, 506-7 (CC Colo.-1902) ("If strangers to the suit can be in any manner or to any extent bound by the result, they ought to be at liberty to inquire how the controversy is carried on. . . . These cases and others support the common-law rule that a party may have inspection of any document or paper in which he may be interested"), quoted with approval in *In re Greenbaum*, 243 Fed. 965, 969 (ED Mich.-1917); and other decisions collected at 175 ALR 1260. The open-record rule is simply one facet of the general principle of "sound public policy to avoid secret judicial proceedings in the course of trial so far as possible". *United States vs Consolidated Laundries Corporation*, 266 F2d 941, 942 (CA 2-1959). The few cases in which closure orders have been sustained have involved discovery material covered by Civil Rule 30b, or related affidavits ordered sealed temporarily pending trial or hearing of a motion. See *International Products Corp. vs Koons*, 325 F2d 403 (CA 2-1963), *Parker vs Columbia Broadcasting System*, 320 F2d 937 (CA 2-1963), and *Baim & Blank, Inc. vs Bruno-New York, Inc.*, 17 FRD 346 (SD NY-1955), the only cases cited in United's brief to the District Court.

The seriousness of a closure order is greatly amplified when entered in a Government antitrust suit which, unlike a private action, is brought in the public interest, and affects, not merely the interests of the particular defendant, but those of all of its competitors and of the consuming public generally.

The Publicity in Taking Evidence Act, while referring in terms only to depositions,[2] is expressive of a broad congressional policy of open records and proceedings in public antitrust actions, especially those ending in consent decrees. *Olympic Refining Co. vs Carter,* 332 F2d 260, 264 (CA 9-1964), cert. den., 279 US 900; and see the excerpts from the congressional debates and committee report at page 17 below, and Report of the Antitrust Subcommittee of the House Judiciary Committee, on the Consent Decree Program (1959), 25: "The element of secrecy that surrounds the entire consent-decree program is contrary to the general policy established by Congress, that antitrust enforcement proceedings shall be public."

This Court has recognized the public benefit from exposure of antitrust compliance procedures to the informed study and comments of those affected thereby, by laying down liberal intervention rules in *Cascade*

[2] "In the taking of depositions of witnesses for use in any suit in equity brought by the United States under sections 1-7 of this title, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." 15 USC §30.

Natural Gas Corporation vs El Paso Natural Gas Co., 386 US 129 (1967); and see *Missouri-Kansas Pipe Line Co. vs United States*, 312 US 502, 506 (1941). This public interest is closely akin to that "in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action." *Lawlor vs National Screen Service*, 349 US 322, 329 (1955).

The United States has espoused the same principle in its statement of official policy of encouragement of all interested persons to make known their views as to proposed consent decrees, prior to approval thereof by the Department of Justice. 28 CFR §50.1. And, as stated by the Department in its brief in the District Court in this case, "these outsiders cannot be well informed if the basic data is kept secret."

The extraordinary complexity of the banana-import business—involving the cultivation of fragile plants, peculiarly subject to hazards of weather and disease, on selected acreages in tropical countries of uncertain economic and political stability, rapid transportation of a delicate and perishable product in expensive specially-constructed refrigerated vessels, ripening of the green-cut fruit in special storage facilities after discharge, and sale thereof in a volatile market having no controllable relationship to the availability of the fruit, which must either be cut, transported, ripened and sold on a fixed schedule, or lost entirely—appears from the pleadings herein (amended complaint, article III, answer, articles III-XX).

These facts explain why the Government is so anxious to obtain expert assistance in evaluating the viability of United's plans for establishment of a new company to compete in this multi-risk field of endeavor, and in making sure that the new company is being fashioned as a shield for the smaller companies against United, rather than as a weapon for use by United against them.

United opposed appellant's motion below on the ground that "acceptance of a consent judgment by an antitrust defendant should not be used to subject a defendant to further exploration and annoyance by private parties, or to promote or support attacks by them concerning sensitive information relative to defendant's business operations contained in . . . documents filed with the Clerk of this Court pursuant to the consent judgment", and that "the allowance of examination of these materials by a competitor of United in this case would be inconsistent with the very real public interest in the use of consent judgments as the principal means of disposing of antitrust litigation."

This contention, which is unsupported by authority and was not accepted by the District Court, is unfounded and dangerous. There should be no public policy of secrecy surrounding antitrust litigation terminated by a consent decree negotiated between the defendant and the Government. To the contrary, these, above all other cases, should be exposed to the light of publicity to assure that the public interest really is being served. *Cf.* Report of the Antitrust Subcommittee of the House Judiciary Committee, on the Consent Decree Program

(1959), x-xiii, 12-18, 22-26; *Olympic Refining Co. vs Carter*, 332 F2d 260, 264-65 (CA 9-1964), cert. den., 379 US 900. This is particularly true inasmuch as entry of a consent decree, by foreclosing the monopolist's victims from the private-suit *prima-facie* evidentiary effect of a judgment for the Government after trial (15 USC §16(a) proviso), confers on the defendant "substantial immunity from private antitrust actions". Report of the Antitrust Subcommittee of the House Judiciary Committee, on the Consent Decree Program (1959), 23.

United argued, and the District Court held, that the programs and progress reports should be sealed because appellant and United's other smaller competitors would otherwise be enabled to prepare to take unfair competitive advantage of the new company. This accusation against smaller companies which have never been accused of unfair competition, by a giant monopolist which has been the object of more than one antitrust action,[3] seems more than a little disingenuous.

The smaller companies, whom the consent decree was designed to protect, have at least as much interest as United in assuring the success rather than the failure of the new company. More fundamentally, why should the monopolist, whose antitrust violations the decree

[3] In addition to the action here at issue, see paragraph 44 of the amended complaint, and *Bluefields SS Co. vs United Fruit Co.*, 243 Fed. 1 (CA 3-1917), error dis., 248 US 595; *Banana Service Co. vs United Fruit Co.*, 15 FRD 106 (DC Mass.-1953); *Sanib Corp. vs United Fruit Co.*, 135 FS 764 (SD NY-1955); *Banana Distributors, Inc. vs United Fruit Co.*, 269 F2d 790 (CA 2-1959); *United Banana Co. vs United Fruit Co.*, 362 F2d 849 (CA 2-1966); *International Railways vs United Fruit Co.*, 373 F2d 408 (CA 2-1967), cert. den., 387 US 921.

was intended to remedy, have not only control over the new company's organization and establishment, with power to cause it to act to the detriment of its smaller competitors, but also the privilege of keeping secret its plans for the new company, thereby both compounding its competitive advantage and inhibiting the protests by the smaller companies which it is in the public interest to encourage?

The District Court's disregard of this anomaly on the premise that the situation is not of United's making, overlooks the fact both that the antitrust action was occasioned by United's own wrongful and anti-competitive acts, and that the creation of the new company, and United's obligations to file progress reports, stem from its voluntary election to forgo a trial on the merits in favor of a consent decree.

The Court's reluctance to permit appellant to inspect the programs and reports absent any power to order appellant to disclose its affairs to the new company, overlooks the fact that appellant is an established company whose operations are well known in the industry, and that the new company has employed one of appellant's key executives who is under neither a legal nor a moral obligation (and would psychologically be unable) to discharge his duties to the new company in disregard of his intimate knowledge of appellant's business.

Conclusion

For these reasons, it is respectfully submitted that the question presented is so substantial as to require plenary consideration for resolution thereof.

Eberhard P. Deutsch,
Attorney for Appellant

Robert M. Moore,
René H. Himel, Jr.,
Overton T. Harrington, Jr.,
Deutsch, Kerrigan & Stiles,
Of Counsel

October, 1968

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
New Orleans Division

Civil Action No. 4560

UNITED STATES OF AMERICA,
Plaintiff,

v.

UNITED FRUIT COMPANY,
Defendant.

ORDER

The motion of Standard Fruit & Steamship Company for an order permitting it to inspect and copy reports and programs submitted by defendant United Fruit Company to this Court relating to the proposed plans, practices and policies of Sovereign Fruit Company as well as any other portions of the record in this proceeding came on for hearing before this Court on August 1, 1968. The Court, having heard oral argument and having considered the briefs and affidavits filed by the parties, now finds: (1) That the considerations that led the Court to restrict inspection and copying of documents produced pursuant to pretrial discovery and of answers to interrogatories continue to exist; (2) That the reports and programs relating to Sovereign Fruit Company filed and hereafter to be filed contain and will contain confidential commercial information relating to the proposed operations of that company after its stock has been divested by United Fruit Company; (3) That dis-

closure of this information to Standard Fruit & Steamship Company will give it a competitive advantage; (4) That this Court has no jurisdiction or authority to require Standard Fruit & Steamship Company to supply either United Fruit Company or Sovereign Fruit Company with comparable competitive information relating to the commercial activities of Standard Fruit & Steamship Company; and (5) That the purposes of the Final Judgment and the public interest will not now be served by granting the motion of Standard Fruit & Steamship Company.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of Standard Fruit & Steamship Company shall be and hereby is denied, without prejudice to the right of Standard Fruit & Steamship Company or the plaintiff herein to make hereafter the same or a similar motion.

Done this 14th day of August, 1968.

/S./ SEYBOURN H. LYNNE,
Judge.

Excerpts from the Congressional Debates and Committee Report on the Publicity in Taking Evidence Act, Senate Bill 8000, 62nd Congress, 3rd Session

"Mr. NORRIS. . . . It is conceded by everybody that there are some cases that arise in court where there are reasons why the evidence should be taken in secret . . . but none of these reasons exist in cases brought by the Government under the Sherman antitrust act . . ." 49 Cong. Rec. 2511.

"Mr. CLAYTON. . . . In all these matters like the shoe machinery trust case the public is interested, and in every one of these investigations, through the medium of spreading the information through the press and through the bystanders who heard it, public information has been disseminated, and in many cases the Department of Justice has had its attention called to other facts with which it was unacquainted until these public hearings. . . . Now, Mr. Speaker, the day has long since passed when we should have star-chamber proceedings, and the public has a right to know, especially in a matter like the Shoe Machinery Trust case, what is going on, because a suit of that kind is not between private parties. It is a suit in behalf of the people." 49 Cong. Rec. 2512.

"Mr. NORRIS. . . . The first reason is that unless there is some reason to the contrary, the proceedings of court should always be open to the public. If we are going to permit the decision of this court to stand . . . you will be met at the threshold of every prosecution

under the Sherman antitrust law with an application for a secret hearing. In effect, it will mean that in every case under the Sherman antitrust law the evidence shall be buried and not given to the public if we do not pass this legislation. . . . (T)he cases to which this act would apply are always cases in which the United States Government is a party commenced by the Attorney General of the United States. He represents the people of the United States, and any citizen ought to have the right to go into the court and have cognizance of the proceedings . . ." 49 Cong. Rec. 2513.

"Mr. GREEN of Iowa. Has not the public the right to know whether these officials, such as the Attorney General, are conducting these examinations properly, and how will they know unless they be made public?" 49 Cong. Rec. 4622.

"In reality the people of the country are plaintiffs in the suit, and the taking of the evidence in secret, either by the court or any master representing the court, is not only contrary to the fundamental idea of our jurisprudence, but it would often result in a denial of justice. Everything pertaining to our courts should have the greatest publicity. Secret hearings would surround our courts with a mystery of doubt and eventually bring them into disrepute. If our courts are to retain the confidence and respect of the country generally, their official conduct must be entirely free from any suspicion of star-chamber proceedings." House Report 1356, 62nd Cong., 3rd Sess., p. 2, quoted at 49 Cong. Rec. 4627.